Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Implementation of Section 273(d)(5)	)	GC Docket No. 96-42
as amended by the Telecommunications Act	)	
of 1996 – Dispute Resolution Regarding	)	
Equipment Standards	)	

COMMENTS OF BELL COMMUNICATIONS RESEARCH, INC. IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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Joseph A. Klein
James D. Porter, Jr.
Michael S. Slomin
445 South Street
Morristown, New Jersey 07960

SUMMARY

This proceeding is addressing alternate dispute resolution, in the special circumstances of preparation of standards and generic requirements by non-accredited standards development organizations. Bellcore is one such entity, and is even named in the provisions that spawned this proceeding, Section 273(d) of the Telecommunications Act of 1996, but it is by no means the only such entity. Disputes to be addressed under Section 273(d) are to be technical disputes between a party funding the standard or generic requirements development work at issue, and the standards development organization. Dispute resolution is to be completed within 30 days of its initiation.

In its comments, Bellcore emphasizes the importance of generic requirements to funding parties, who bear the substantial expense of their development. Bellcore recommends against the use of binding arbitration as proposed because, among other reasons, it is inconsistent with the voluntary nature of the underlying standards and requirements processes, it does not accommodate the interests and needs of the other funding parties, and it is unlikely to meet the timeliness requirement of the statute. Rather, Bellcore recommends that flexibility be accorded the funding parties to select by majority vote among multiple dispute resolution techniques and multiple forums. The available alternatives would be described in the Commission's rules.

One alternative would be a flexible mediation/recommendation approach that embodies review and suggested resolution of each disputed issue by an expert panel. Bellcore recommends adoption of a described default tri-partite mediaton/recommendation approach that would apply if the funding parties select it, or if they fail to agree on an alternative. A benefit of such a tri-partite approach is that it enables participants in earlier phases of development of the standard or generic requirement at issue – who may be the only people with sufficient expertise to address the dispute

in the 30 day statutory period – to help decide the dispute, but in a manner that nullifies any bias they may have, whether feared or real.

We agree with one party filing early comments, Corning, Inc., which has similarly proposed that binding arbitration not be used. However, Corning's alternative, automatic referral of disputes to an accredited standards body that addresses standards for the products involved, is also undesirable. While this is an alternative that can and should be available to the funding parties, Bellcore strongly recommends against this being an automatically used or required approach.

A fundamental flaw in the Corning proposal is that it may often lead to no resolution at all of key technical issues – frustrating the essential purpose of the majority of funders who want the benefit of high quality and complete technical documents. Another flaw is the extent to which such a referral may effectively disenfranchise or dilute the ability of funders of the work to help resolve a matter which is vital to their services and operations. Also, limiting this to a "product"-directed standards body (as proposed by Corning) could foreclose consideration by other expert standards bodies, for example the ANSI-accredited T1 Committee that ordinarily addresses telecommunications interfaces rather than the innards of telecommunications products; the standards body may not be able to reach a decision within the statutory 30 day period; and, in the final analysis, a standards body is no more or less neutral than other bodies.

Bellcore's proposal remedies these problems while remaining faithful to the Conference Report's admonition that the dispute resolution process must "enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness, and technical quality of the activity."

Bellcore urges the Commission to consider its proposals carefully.

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IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

TO: The Commission

Bell Communications Research, Inc. ("Bellcore") is pleased to file the following comments in response to the Notice of Proposed Rulemaking ("NPRM") in this proceeding. We commend the Commission and staff for their expedition in initiating this proceeding, and for their concisely addressing difficult issues that could significantly affect telecommunications evolution and efficiency.

I. INTRODUCTION:

Section 273(d) of the Telecommunications Act addresses certain standards and generic requirements "established and published" by non-accredited organizations. The statute names only Bellcore, but it also applies to a large number of organizations such as industry committees, industry forums, and groups that could be developing various requirements under the auspices of state regulators. Section 273(d) even applies to accredited standards organizations by mandating their protection of proprietary information, Section 273(d)(2).

This proceeding focuses on Section 273(d)(5), which requires the Commission to adopt by May 8, 1996, an alternate dispute resolution process for technical disputes between a party funding standards or generic requirements work and the non-accredited standards development organization it is funding. This fallback is to be used only if all of the funding parties have not agreed to a process proposed by the non-accredited standards developer at the outset of the work, as appears to be contemplated under Section 273(d)(4).

There was no public substantive debate in the Congress with respect to Section 273(d), to assist in its interpretation or implementation. Bellcore believes that Section 273(d)(5) must be interpreted and implemented with a careful appreciation of its impact on the public interest and on Bellcore, as well as its impact on all of the many non-accredited standards development organizations dealing with telecommunications equipment or customer-premise equipment requirements, specifications or standards for use in providing exchange services in the United States. They too may be viewed as non-accredited standards organizations whose work falls within the ambit of Section 273(d), and whose processes must now include compliance with the dispute resolution process adopted by this Commission

A. Bellcore's Dispute Resolution Proposal

Bellcore proposes an implementation of Section 273(d)(5) which it believes essential to the viability of its continuing work as the primary developer of proposed generic requirements for telecommunications equipment and services in the United States and which it also believes will permit the flexibility necessary for other non-accredited organizations to deal with Section 273(d)(5) technical disputes in a manner acceptable to the majority of those funding and supporting their work. This work benefits the industry and the public.

Bellcore's proposal is that the Commission adopt under Section 273(d)(5) a series of optional dispute resolution procedures, from which a majority in interest of those funding the standards or generic requirements effort may select the procedure they believe most appropriate to resolve technical disputes between any one of them and the non-accredited standards development organization in connection with the work they are funding, or the dispute they confront. One of these options – mediation/recommendation by an expert advisory panel – can also serve as the Commission's prescribed default alternate dispute resolution process in the event of a deadlock that precludes a majority decision by the funding parties (discussed in greater detail in these comments and the Appendix). This flexible approach will enable the majority of the funding parties, who are the critical support for a requirements or standards development effort, to obtain a high quality and useful work product in a timely fashion, while making sure that a disputant has the opportunity to have its technical concerns fairly considered.

Bellcore submits that the process should provide options under Section 273(d)(5) for the funding parties to choose among (and combine, if a majority chooses to do so) any of the following options: (1) escalation within the issuing entity (as is the approach employed by such organizations as the Internet Engineering Task Force and ANSI-accredited groups such as the T1 Committee), which may simply obviate the dispute saving time and effort; (2) determination by a majority in interest of those funding the standards or generic requirements development effort, excluding the disputing party (and the non-accredited standards development organization) from this determination; or (3) mediation/recommendation by an expert advisory panel (one form of which may be a tri-partite panel).

Each of these options would provide for presentation of the issue by the disputant and a strict time limit in accordance with the Act for the resolution of the issue. However, multiple

options avoid a "one-size-fits-all" solution which might otherwise prove fatal to a majority of funders' need for timely, complete technical solutions. This approach avoids the inherent flaws of mandatory arbitration, pointed out by Corning in its early filing and discussed further herein. These options also avoid leaving critical issues unresolved and prey to incompatible and proprietary solutions offered by dominant suppliers, as would be the likely effect of Corning's proposal for automatic referral of technical disputes to a "product"-directed standards body, such as TIA's Engineering Committees. Corning also proposes that "affiliates" of the non-accredited standards development organization not participate.[1] Thus, the net effect of Corning's proposal could easily be a disenfranchising of the significant number, perhaps a majority, of funders of a generic requirement from involvement in resolving a technical dispute vital to their needs as exchange carriers for high quality interoperable equipment. Indeed, Corning's proposal could leave the toughest technical issues unresolved altogether.[2]

In contrast, with a reasonable array of options designed to achieve the statutorily-mandated resolution of the disputed technical issue within the necessary time frame, continuing voluntary industry support for timely and complete implementations needed for deployment of reliable and interoperable services will be enhanced rather than frustrated. And that, we submit, is what Section 273(d)(5) should be construed to accomplish.

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1 Corning's comments, March 21, 1996, hereafter "Corning comments", at 8, n. 11 ("excluding those members affiliated with the [non-accredited standards development organization] or the Disagreeing Party").

2 Corning comments, 9, and Attachment A, Section 4.2.1-2 (which would authorize return of an issue to an "open issues" list without deciding it).

B. Background on Bellcore's Generic Requirements

Bellcore's generic requirements complement standards. While Bellcore has been among the most prolific contributors to national and international standards-making organizations in telecommunications for many years and a leader in the work of non-accredited organizations which have performed invaluable work, Bellcore necessarily focuses here on its own process for the development of its own proposed generic requirements. Those published proposals embody Bellcore's views of generic technical information intended to meet the operational needs of typical exchange carriers. By their nature, they are not binding on anyone, be they vendors or purchasers. They provide valuable technical information which each exchange carrier may or may not choose to use (or to modify) in its individual purchasing requests, and with which vendors may or may not wish to conform.

Bellcore's proposed generic requirements relate to such subjects as: (1) the features, functions and performance of telecommunications equipment; (2) reliability and quality processes applicable to such equipment and systems; (3) interface and other information needed to fit equipment into existing public networks and to keep them interoperable; (4) necessary implementations of standards adopted by accredited standards organizations relevant to equipment, equipment testing and interoperability; (5) new technologies for telecommunications equipment and services; (6) interfaces with and interoperation within and among public networks; and (7) other vital aspects of telecommunications.

Although Bellcore's proposed generic requirements have been informed by comments from interested members of the industry, their development has been funded at Bellcore by Bellcore's present owners, the Regional Bell Companies. Those companies have been aware of the need for the development of timely published technical views in order to offer new services,

obtain new and interoperable equipment from competitive multiple sources of supply supporting such services and to achieve appropriate levels of service reliability in a divested world. These proposed generic requirements also have been heavily relied upon throughout the industry in maintaining interoperability and reliability of telecommunications equipment and services.[3]

Generic requirements promote competition and reduce reliance in the industry on individual vendors' proprietary interfaces in favor of published open interfaces. This reduces the power that a dominant supplier could otherwise exercise over its exchange carrier customers, by reducing entry barriers for other suppliers seeking to supply products competitive with or complementary to those of dominant suppliers.

Without such efforts, carriers and the public they serve would confront the choice of either suffering substantial problems of incompatibility of equipment or expensive market control by a few large suppliers of equipment able to offer interoperable proprietary solutions of their own to carriers in need of reliable solutions. It is because of the efforts of non-accredited organizations such as Bellcore that the laudable efforts of accredited standards organizations, which often include incompatible options and lack of detailed implementations, become implemented and feasible. Finally, unlike some situations where issues can be left unresolved (as could occur under the Corning proposal for example) or subjected to non-optimum compromises, Bellcore's generic requirements deal with its view of technical issues which must be resolved with high quality solutions on a timely basis in order to meet the needs of carriers and the public.

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[3] *Increased Interconnection Task Group II Report,* Network Reliability Council, Jan. 14, 1996, at 20-21 and Fig. 4-7 ("data indicates a high reliance by the industry on Bellcore TRs/GRs [Technical References and Generic Requirements]").

This is why the public good requires a careful appreciation of the chosen words of Section 273(d) to avoid frustrating the efforts from which so many benefits are obtained. And it is in that spirit that Bellcore submits these comments.

In this context, Congress recognized that only **funding** parties were the entities whose technical disputes with an issuing entity were to be the subject of the dispute resolution process referred to in Section 273(d). These provisions were not designed to permit a non-funder having a "bone to pick" with the issuing entity to compel delay by invoking or participating in such a procedure. To permit such situations would frustrate work paid for by others while the alternative dispute resolution process is invoked. No funding entity is likely to tolerate that for long. The Section repeatedly makes clear its application only to funding parties. Sections 273(d)(4)(A) and 273(d)(5).

Congress also recognized the urgency involved in developing and issuing generic requirements and standards in a competitive world, and therefore directed that such disputes were to be resolved in 30 days. Section 273(d)(5).

Bellcore urges the Commission, as it considers adopting dispute resolution procedures in this proceeding, to remain sensitive to the importance of maintaining the effectiveness of generic requirements and the effectiveness of the efforts of other non-accredited entities, while providing those supporting such efforts the flexibility they need to fashion effective procedures. The statutory provisions trigger when a particular generic requirement or standard is to be "industrywide", *i.e.*, "funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access lines deployed by

telecommunications carriers in the United States as of the date of enactment of the Telecommunications Act of 1996." Section 273(d)(8)(C).

As the next section discusses in detail, the Congress, sensitive to the concerns reflected above, imposed several important limitations on the new dispute resolution process, while granting the Commission the latitude to develop a truly flexible alternative dispute resolution process to address technical disputes between a funding party and the issuing entity. Specifically, Congress limited standing in the new alternative dispute resolution process to parties funding the requirements development, imposed very strict time constraints on the achievement of a resolution, required resolution of a technical dispute between a funding party and the non-accredited standards development organization in an open and non-discriminatory process within those time constraints, and stipulated a very limited governmental role in what has been, and is to remain, an industry process. One other constraint was imposed on the Commission – the overall need to decide on the alternate dispute resolution process within 90 days of enactment.

II. SECTION 273(d) STATUTORY PROVISIONS

It is crucial in determining the appropriate process for dispute resolution to recognize, as the Act does, the underlying purpose of industry-wide generic requirements. The focus of Section 273(d), as it relates to dispute resolution and "industrywide" generic requirements, is explicitly on the timely needs of the local exchange carriers[4] as purchasers who will want to ensure

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[4] Section 273(d) makes alternate dispute resolution procedures available to address disputes concerning "industrywide" standards and generic requirements (with "industrywide" defined under Section 273(d)(8)(C) as activities funded by or peformed on behalf of local exchange carriers whose combined access lines meet a statutory threshold), and generic requirements (defined under Section 273(d)(8)(B)as "product attributes for use by local exchange carriers in establishing product specifications for the purchase of

identification of the technical attributes they need on a timely basis to obtain quality, cost effectiveness and interoperability in the products which they purchase.[5]

The statutory scheme does provide the opportunity for any interested member of the industry, including suppliers, to help fund a particular activity of the non-accredited standards development organization and thereby be permitted to participate in the activity, as set out in Section 273(d)(4). However, while Congress sought to provide funding parties, including suppliers, certainty that some form of dispute resolution procedures will be available to them (either one agreed to by all parties at the outset, or one addressed by the Commission in its alternate dispute resolution rules), it did not seek to hand any funding party a *de facto* veto over requirements which are in fact acceptable to the majority of the funders. To grant a single funding party such an ability could reduce or even nullify the substantial benefits that are provided exchange carriers and their subscribers – but not necessarily all of their individual suppliers – by generic requirements.

This conclusion is reinforced by Section 273(d)(4)(A)(v), which posits three critical limitations on the alternative dispute resolution procedures to be established by the Commission under Section 273(d)(5). First, the subject of such Commission-established procedures is to be only "a dispute on technical issues." Second, Commission-established procedures are to be available only to "a funding party." And third, the Commission-established procedures are to be

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telecommunications equipment, customer premises equipment, and software integral thereto.")

[5] Suppliers' incentives are not necessarily the same as those of exchange carriers. This was recognized in the 1987 Triennial Report filed by the Department of Justice with the Decree Court, which noted that "(S)tandardized purchasing requirements are generally thought to reduce the market power of sellers." Geodesic Network: 1987, at 14.10.

available only if the non-accredited standards development organization and the funding parties have failed "as a group" to agree to "a mutually satisfactory dispute resolution process which the parties shall utilize as their sole recourse." Each of these limitations is important, because it limits unwarranted and counter-productive interference with the technical functions involved.[6]

A. Technical Disputes Only

The Commission-prescribed Section 273(d)(5) alternate dispute resolution procedures are to be available for resolution of technical disputes, and not other ones. Section 273(d)(4)(A)(v) states that a non-accredited standards development organization shall seek to agree with the funding parties as a group on a mutually satisfactory dispute resolution process "which such parties shall use as their sole recourse in the event of a dispute on technical issues as to which there is disagreement between any funding party and the entity conducting such activities," and that if no dispute resolution process is agreed to, that a funding party may utilize the Commission-specified Section 273(d)(5) dispute resolution procedures. To implement this limitation, Section 273(d)(5) refers back to the (d)(4)(A)(v) provision

B. Funding Parties Only

In recognition of the significant costs associated with development of generic requirements, and that dispute resolution procedures should be available only to parties with a real interest in the outcome (as demonstrated by their funding commitment), Section 273(d)(4)(A)(v) states that "a funding party may utilize the dispute resolution procedures established pursuant to

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[6] The provisions in Section 273(d)(5) addressing "delays caused by referral of frivolous disputes to the dispute resolution process" similarly manifest the congressional intent that the efficacy and timeliness of the generic requirements development process not be adversely affected.

paragraph (5)." Section 273(d)(5) similarly states that "[s]uch dispute resolution process shall permit any funding party to resolve a dispute with the entity conducting the activity."

C. Meeting the Needs of All Funding Parties

Under the statute, a non-accredited standards development organization is to invite interested entities "to fund and participate" in the standards or generic requirements development process on a reasonable and non-discriminatory basis, Section 273(d)(4)(A)(ii). This follows the public announcement of the issuing entity's consideration of the requirements, Section 273(d)(4)(A)(i). The Act clearly places these activities where anyone undertaking expensive development of such technical work would want them – at the outset of the work. As part of this initial effort, the issuing entity is adjured to propose a dispute resolution procedure as to which all of the funding parties mutually agree. If a funding party does not agree, the dispute resolution procedure to be determined by the Commission is used, Section 273(d)(4)(A)(v).

Section 273(d)(4)(A)(v) states that Commission-established dispute resolution is to be available only if the non-accredited standards development organization and all of the funding parties have failed "as a group" to agree to "a mutually satisfactory dispute resolution process which the parties shall utilize as their sole recourse." Because these are funding parties, they must have agreed at this point to fund the work, and in order to complete agreements necessary to proceed, the issuing entity will have proposed a technical dispute resolution procedure to those it invites to fund.

However, there is no reason to assume from the statutory scheme that the group as a whole will have had an opportunity to consider any resolution proposal but that offered by the issuing entity. And taking literally the language that follows the "as a group" provisions of Section 273(d)(4)(A)(v), "if no dispute resolution process is agreed to by all of the parties, a

funding party may utilize the dispute resolutions procedures established pursuant to paragraph (5)," it seems that one disagreeing funder could force all funders to use the alternative process in such disputes with the issuing entity.

D. Flexibility is Needed and Encompassed in Section 273(d)

If at this stage the Commission were to adopt a process which compelled all funders to resort to only one single resolution procedure for all such disputes, the views of a majority per capita or in funding interest of the group supporting the work would never be applicable to the selection of the process. This would provide any funder with an unwarranted opportunity to undermine the generic requirements development process by frustrating the timeliness of the work and possibly by throwing decisions (or non-decisions as Corning's comment would permit) to a totally unrelated group which has no such investment or need.

There is no single "one-size-fits-all" solution assured of acceptance by those who are most interested in the work, the funders, other than one a majority agrees should apply. And certainly no single solution imposed by the Commission from a model developed as an alternative to very extensive regulatory or litigation proceedings is likely to be doable or appropriate in a very constrained time period when applied to a process dependent on private funding and goodwill. That is why Congress granted the Commission discretion to establish a dispute resolution process, without specifying that process.

As will be detailed later in these comments, Bellcore is proposing that the Commission-established Section 273(d)(5) dispute resolution procedures include alternatives. In order to assure that the majority of the funding parties have the opportunity to decide on an appropriate alternative dispute procedure for the requirements work at the outset, Bellcore proposes that the Commission permit the funders as a group, by majority vote, to specify at the outset of the work

which of the dispute resolution alternatives is to apply, in the event one or more of them rejects the proposal of the issuing entity for a process. Selection among a menu of possible choices in the Commission's implementing rules would permit a majority of those most affected by the work, and with the greatest concern for it, to select among options which they think appropriate without being stopped by one funder who may have an agenda quite different from theirs. Alternatively, we are proposing that funders be permitted to do so when, and if, a technical dispute actually arises and alternative dispute resolution is invoked; at that time, they may be in a better position to determine how best to proceed

As the Commission has acknowledged when considering a somewhat analogous overlaying of standards and related processes with rulemaking, "[s]ubjecting the design process to an often adversarial formal rulemaking procedure would paralyze the design process. Design judgments cannot be made on the basis of legalistic pleadings because complex tradeoffs among the elements of an overall design often are required." *Integrated Services Digital Networks*, 98 FCC 2d 249, 286 (1984). The "design process" the Commission was addressing was activity in the diversity of standards and non-standards bodies then addressing ISDN. Alternate dispute resolution contemplated by Section 273(d)(5) can also be adversarial, and therefore should fashioned with this same concern in mind

Also, there is a real danger that complex technical decisionmaking could shift routinely from being addressed by experts in the standards organization to decisionmaking in alternate dispute resolution if the ability of the funding parties to meet their needs by fashioning their own dispute resolution procedures is undermined by requiring, at all stages, unanimous agreement by the funders. The Commission itself acknowledged the undesirability of this, by analogy, in the foregoing ISDN decision When considering whether to maintain FCC as, in effect, an appellate

body to which disputes could be brought from the standards and other bodies then engaged in ISDN planning, the Commission said:

> "Technical issues undoubtedly will arise where there will be differences of opinion on the appropriate approach. The U.S. CCITT Organization and its subgroups make recommendations to the Department of State using consensus procedures, not unanimity, and the various voluntary standards and technical organizations similarly use consensus procedures, thus there will be participants whose views are not accepted. The FCC will not assume the role of an appellate body to which such differences may be appealed. Adequate review mechanisms are in place to which such differences, if they arise, may be brought."

Integrated Services Digital Networks, 98 FCC2d at 288-89. We strongly urge the Commission to retain the alternate dispute resolution procedures as the extraordinary, rarely used ones that we believe Congress intended, and to encourage the parties to adopt their own procedures whenever possible.

Finally, under the statutory plan a party is eligible to invoke the alternate dispute resolution procedures only if it agreed to fund the development of the generic requirements at the outset of their development. A party cannot seek to become a funder at the 11th hour to gain eligibility to invoke dispute resolution procedures.[7]

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[7] The statute sets forth time-sequenced events: (1) a public notice by the standards development organization; (2) a public invitation to interested industry parties to fund and participate; (3) agreement by all funding parties with the standards development organization on a mutually satisfactory dispute resolution process prior to publishing a text for comment, and if one is not agreed to, a funding party may utilize the Section 273(d)(5) dispute resolution procedures; and (4) publication of a text for comment by the parties that have agreed to fund and participate, including in their entirety the comments of any funding party that requests to have its comments so published. Section 273(d)(4)(A). A party becomes a funder under this plan after step 2 and before step 3.

III. PROPOSED DISPUTE RESOLUTION PROCEDURES

Bellcore strongly urges the Commission to encourage the parties funding each generic requirements development project to work with the non-accredited standards development organization when they initiate the project to arrive at procedures that are acceptable to all. The Commission is required to adopt alternate dispute resolution procedures that apply only if the parties fail to do so, and we believe that use of any such procedures should be the exception, not the rule.

A. Decisions Need to be Reached by Those With Relevant Expertise

It is Bellcore's view (and that expressed by the Commission in the previously-cited ISDN decision) that technical decisions are best made by technical personnel with expertise in the subject matter. In many cases the only people with the requisite expertise will be some of the very personnel involved in development of, or commenting on, the generic requirements at issue, or colleagues of those personnel in their companies with an interest in the subject matter Generic requirements are often, of necessity, at the "cutting edge" of technology and technology implementation. There is often a limited pool of personnel with such expertise. Because of this, even if it were appropriate or permissible for the Commission to seek to impose third-party arbitration on the parties, the fundamental assumption of the Commission, that a third party "neutral" arbitrator can be found with expertise to render an opinion in the thirty day period specified by the statute, will often be incorrect

B. Alternate Dispute Resolution Here is Unique

The alternate dispute resolution procedures originally fashioned by Congress as an alternative to rulemaking and adjudication under the Administrative Procedures Act, and to

address contractual and other disputes with an agency as a party,[8] are a useful starting point for analysis. However, they should not be mechanistically overlaid on the generic requirements process. Although the currently-suspended Dispute Resolution Act, to which the Notice refers, contains principles that have applicability here, its dispute resolution mechanisms do not otherwise fit very well.

In particular, these principles include voluntariness, consent of the parties, and the inappropriateness of using alternate dispute resolution when the interests of non-disputants are involved.[9] Binding third-party neutral arbitration is inconsistent with each of the foregoing principles. It is not voluntary; it is to be imposed. The Commission cannot force the disputing party and non-accredited standards development organization – the statutory parties to the Section 273(d)(5) dispute resolution – to consent to the use of arbitral procedures in every case, and even if it could somehow do so, there are other parties that are affected by the outcome, the other funding parties.

We believe that the principles of voluntariness and consent underlying the Dispute Resolution Act can and should be applied to arrive at implementing rules that are flexible, and that address the needs of all parties to the generic requirements process, and not only those of the disputing party and the non-accredited standards development organization.

C. Non-Binding Mediation/Recommendation Should be Used Instead of Arbitration

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8 Dispute Resolution Act, 104 Stat. 2736-37, Section 3(a)(2).

9 Alternate dispute resolution procedures under the Dispute Resolution Act were to be "voluntary" (Section 582(c)), agreement to the proceeding is required (Section 582(a)), arbitration can be used only if all parties consent (Section 585), and the agency is directed not to use alternate dispute resolution if the matter significantly affects non-parties to the proceeding (Section 582(b)(4)).

Rather than using binding arbitration, which has the inherent flaws pointed out by Corning in its filing,[10] Bellcore strongly recommends that the Commission adopt a non-binding mediation/recommendation approach, as detailed in the Appendix to these comments, as one of the options available to the majority of funders and, in the event of a deadlock, as the Commission's prescribed default procedure Mediation/recommendation is likely to be more acceptable to the remaining funders – whose interests may be far more at stake than those of the disputing party and the non-accredited standards development organization – than arbitration. As noted previously, generic requirements are not binding They only have meaning if exchange carriers choose to use them and if suppliers choose to conform their products to them. Neither of these can be or should be imposed externally

Binding arbitration, while quicker than full-blown trials, would not meet the test of timeliness and efficiency required here.[11] Furthermore, Bellcore believes that it will be more acceptable to all parties for people involved in the generic requirements development process to participate in the dispute resolution decisionmaking process if it is not a binding arbitral process.

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[10] Corning comments, 5-7.

[11] As the Commission recognized in its Notice of Proposed Rulemaking, the Conference Report stated that the intended purpose of the Commission's dispute resolution process is to "enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness, and technical quality of the activity." H.R. Conf. Rep. No. 230, 104th Cong., 2d Sess. 39 (1996). Available empirical data on the use of mandatory arbitration as an alternative to formal judicial trials indicate that it does not necessarily result in more efficiency in the courts, and supports the conclusion that it is itself time-consuming. See, 1993 *Journal of Dispute Resolution* 1, 47. Mandatory arbitration tends to be imposed more on routine, smaller claims. *Id.*, 51. Compounding the problem here - and leading to even greater delay - is finding arbitrators agreeable to all parties with the highly specialized technical expertise needed to effectively address issues arising from the detailed content of generic requirements, issues that are anything but simple or routine.

Finally, this approach avoids difficulties associated with seeking to reconcile a binding arbitral process with the notion that it is carriers that determine their purchasing requirements and purchases, not an arbitral panel or award.[12]

D. Standards Bodies Should Not Be the Only Forum

In its comments herein, Corning has similarly argued against binding arbitration and in favor of referral of disputes to one group of potentially expert technical personnel, an accredited standards body.[13] However, an accredited standards body is no more or less likely to be "neutral" than any other body open to participation by interested parties. Standards bodies are not corporate entities with a permanent technical staff; they are a collection of members that have representatives who participate voluntarily in the standards body, and that must defray their own expenses (travel, lodging, salary) and an aliquot portion of the expenses of the standards body (*e.g.*, secretariat expenses, meeting expenses, etc.). Members send representatives to specific subgroups within a standards body based on the work programs of the subgroups. The participants are generally employed by companies with an interest in the subject matter, which

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[12] Generic requirements are recommendations and proposals to the exchange carriers that use them in their purchasing activities. What is the meaning of binding arbitration in these circumstances? If it merely causes Bellcore or another non-accredited telecommunications standards or generic requirements organization to change the text of a generic requirements document, it does not necessarily affect the carriers' purchasing decisions. Indeed, arbitral jurisdiction is ordinarily consented to by parties seeking arbitration, in this case the disputing party and the standards organization, in contractual provisions in which the parties agree to be bound by the arbitral decision. These parties cannot confer such jurisdiction over others or consent to it on their behalf. Any interpretation that an arbitral award would bind carriers and/or manufacturers would be jurisdictionally flawed. Furthermore, it would represent a dramatic and unprecedented regulatory incursion in carriers' and manufacturers' decisionmaking, which was neither contemplated nor addressed by Congress.

[13] Corning comments, 7-10.

companies bear the foregoing expenses, not for charitable reasons, but because they perceive that their business will benefit from such participation

A standards body may or may not have representatives able to reach a decision in the 30 day statutory period. Those members may or may not be neutral on the matter in dispute. The standards body may or may not have committee, decisional and voting procedures that would permit a "decision" to be reached within the statutory 30 day period. Thus, while it may be appropriate in a particular instance for the funding parties to agree to refer a specific dispute to such a body, this should be only by agreement of these parties and not imposed by the Commission as a "one size fits all" solution in every case.[14]

As a related matter, Corning's proposal that personnel of the disputing parties and their "affiliates" not participate in resolution of the dispute[15] is unnecessary and troublesome. In the case of Bellcore, and depending on what companies would be deemed "affiliates" for this purpose, this could have the effect of disqualifying Bellcore's present owners, even if they constitute the majority of the funders, and have a vital concern, as carriers actually responsible for providing the affected services, in the technical quality and usefulness of the generic requirements at issue that transcends the views of any vendor (or, for that matter, the non-accredited standards development organization).

E. The Funding Parties Should Have Selection Flexibility

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[14] Corning also goes so far as to seek to pick the standards bodies involved, albeit subtly. It proposes reference to a body accredited by ANSI to develop standards "for the relevant class of products." Corning comments, 8. Although the ANSI-accredited T1 Committees are focused on telecommunications and have considerable expertise, their interest is primarily in interfaces, and not products themselves.

[15] N. 1, *supra.*

More generally, consistent with the principles of the Dispute Resolution Act that dispute resolution should be used only when the parties agree to its use and that dispute resolution may be inappropriate when the matter affects non-parties, the Commission's implementing rules should provide the funding parties the opportunity to initially determine, by majority vote: (1) what type of dispute resolution should be used;[16] and (2) if a mediation/recommendation approach is to be used, what group should serve as the mediation/recommendation panel.[17] We propose that the funding parties have the flexibility to make one or both of these determinations either at initiation of the standards development project (if all of the funders have not agreed to accept the dispute resolution proposal of the non-accredited standards development organization), or when and if a dispute actually occurs (in a very short time period) We also propose the adoption of a Commission-specified tri-partite mediation/recommendation process (detailed in the Appendix), which can be selected by the funding parties, or used as a default in the event of a deadlock by the funding parties.

Any option chosen would have to permit presentation of the issue by the disputant and the issuing party, and observe the strict time limits of the Act for the resolution of the issue. We are proposing timetables to achieve this, and urge the Commission to adopt them and additionally

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[16] We are proposing that options available include escalation within the issuing entity (as is the approach employed by the Internet Engineering Task Force and ANSI-accredited groups such as the T1 Committee), and mediation/recommendation.

[17] We are proposing that the funding parties determine by majority vote whether they wish themselves to serve as the mediation/recommendation panel (in which case neither the disputing party nor the non-accredited standards body will serve as members of that panel), whether they wish the dispute referred to another body (for example, an accredited standards body) to serve as the mediation/recommendation panel, or whether they wish the matter addressed under the default non-binding tripartite expert panel mediation/recommendation approach outlined in these comments.

specify that any body or group that is to perform a dispute resolution function must agree to be bound by them, to avoid the possibility that at the end of the thirty day statutory period, there might be no decision.

It should be emphasized that funding parties are not synonymous with the non-accredited standards development organization currently, and they will be less so in the future. Bellcore's generic requirements currently represent Bellcore's views, not necessarily those of one or more of its owner/clients which may have different views. In the future, pursuant to the funding/participation invitations that will be extended under Section 273(d)(4)(A)(ii), it is likely the additional participants will be included in the funding party group.

F. A Conclusion Should be Reached on Each Issue in Dispute

Bellcore proposes that the rules require that a conclusion be reached on each issue in dispute within the thirty day statutory period as to whether there is a sound technical basis for the position of the non-accredited standards development organization in its proposed text. Failure to reach a decision on any issue would result in retention unchanged of the standards development organization's language addressing that issue, subject to a majority vote of the funders. This is consistent with, and implements, the statutory plan that dispute resolution not introduce delay in the generic requirements process, and permits the funding parties – all of which are paying for the development of the requirements in the first place – to vote on the matter. In contrast, Corning advocates an approach under which issues will remain open, perhaps indefinitely, after its proposed dispute resolution process.[18] The industry cannot accept the delays associated with this, and Congress specifically rejected them when it adopted the thirty day limitation.

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[18] N. 2 *supra*. In fact, Corning's proposal could have the effect of allowing a manufacturer-oriented standards body to block issuance of a generic requirement desired by a majority